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Supreme Court, U.S.
FILED
JUN 29 1994
OFFICE OF THE CLERK

No. 93-1935

In The

Supreme Court of the United States

October Term, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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15 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Can an Employer Plan Sponsor that has disregarded the plain statutory mandate of Employee Retirement Income Security Act 402(b)(3), 29 U.S.C. 1102(b)(3) by failing to provide a procedure for accomplishing a plan amendment or to identify the persons with authority to amend the plan, informally redraft a Summary Plan Description and thereby deprive retired participants of lifetime health coverage? The Court below answered no.

Should an Employer Plan Sponsor which has implemented an unlawfully adopted amendment to an ERISA welfare plan purporting to eliminate lifetime health benefits to retired participants be required to disregard such amendment and provide those benefits to participants until such time as an effective amendment is actually adopted? The Court below answered yes.

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JURISDICTION AND STATUTORY PROVISION

Respondent adopts the Statement of Opinions Below and Jurisdiction as set forth in the Petition. The Statement of Statutory Provisions Involved is accepted except to the extent other sections of ERISA are cited below.

COUNTERSTATEMENT OF THE CASE

The Petitioner misapprehends and hence misstates the record below in several important respects:

First, the Petition refers to "the amendment at issue" and "the 1983 amendment" (Pet. 5). But throughout this litigation Petitioner denied that the language added to the 1983 Summary Plan Description was intended to amend its welfare plan. The process had been so casual and haphazard that the Curtiss-Wright witnesses differed as to who had actually prepared the plant closure language. (Compare J.A. 1141 with J.A. 1237). The District Court held that:

> Indeed, in this case the purported amendment was not even considered by Curtiss-Wright to be an amendment at all. Of course, I have ruled to the contrary. Here it was done as a matter of routine redrafting, and is therefore not effective. A.38

Second, the Petition erroneously asserts that the District Court entered judgment for Respondents solely "because the plan did not provide an amendment procedure" (Pet. 6). While the District Court did find that the Plan violated ERISA 402(b)(3) because "there were no

written procedures for amendment of the plan", the Court also considered testimony by Curtiss-Wright that "there may have been an unwritten procedure for amending the plan involving the submission to a certain executive committee" (A.38). The District Court squarely held that, "as the defendant admits, even those procedures were not followed in the case of the 1983 amendatory language" (*Id.*).

Third, the Petition elevates the status of the Summary Plan Description (SPD) issued in 1983 to that of a "governing document" (Pet. 5) definitively declaring the rights and obligations of all plan participants. But the 1983 SPD expressly disclaims authoritative status. The SPD states in response to the question "what are Summary Plan Descriptions" that

> the complete terms of the coverages are set forth in policies issued by the insurance companies that underwrite the insured benefits and in the plan documents of the other welfare and pension plans. *In case of conflict, the terms of the* group insurance policies and *plan documents will prevail* (emphasis added) (J.A. 681).

Therefore, neither the plan sponsor nor participants could rely upon language inserted into the SPD as authoritative.

THE REASONS FOR DENYING A WRIT OF CERTIORARI

Petitioner raises arguments neither relevant to the vast majority of ERISA plans nor well grounded on the facts of this case as found by the courts below. Only

determined and persistent corporate incompetence – unlikely to be duplicated by other plan sponsors – explains Petitioner's initial decision to deprive its retired participants of critically important health care coverage through an act of casual redrafting instead of through a more formal corporate act. It is not too much to expect strict adherence to plain statutory requirements when benefits of this importance are being taken from the sector of our population most vulnerable to health care crises.

The decision below crafts a well-balanced rule which protects both plan sponsors and participants. Plans with amendment procedures are required to follow them. Plans that do not designate persons with authority to effectuate amendments and provide procedures therefor are required to adopt them. Only plan sponsors which have adopted amendments modifying participant benefits by casual, informal means are at any risk by the decision below. The decision does nothing more than sensibly enforce the plain language of the statute.[1]

The remedy ordered flows naturally from the violation found. Petitioner's reservation of the right to amend its plan was upheld and it eventually did amend. Money damages were limited to the period dating from the improper termination of retiree health care benefits to the

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[1] In *In re Unisys Corporation Retiree Medical Benefits ERISA Litigation*, MDL No. 969, (E.D.Pa. June 23, 1994), Judge Cahn commented that Respondent "had won a hollow victory; Curtiss-Wright needed only to adopt an amendment procedure, amend the plan pursuant to that procedure and then terminate whatever benefits it so chose." Slip op. pp. 57-58.

adoption by Petitioner's Board of Directors of a plan amendment effectively terminating such benefits. To do anything less would render the plain language of ERISA's fiduciary mandate a hollow reed.

I. This Case Is Not a Good Vehicle For Examining the Issues Posed by the Petitioner

Petitioner raises concerns that the decision below has immediate and serious consequences for ERISA plans. One answer is that the language of ERISA Section 402(b)(3) is so simple and plain that its enforcement as written should have been and presumably was anticipated by plan sponsors. But the unique facts of this case in which the District Court found that Petitioner never even purported to amend this plan, made no effort to satisfy even its own unwritten procedures and in the end changed only an SPD instead of an authoritative plan document make this Petition a poor vehicle for reviewing the issues posed by Petitioner. Such issues could better be determined where a prudent plan sponsor has acted carefully to amend a plan, in full recognition that an amendment was being made and through its organization's highest decision maker, e.g., a corporate Board of Directors. The simple fact is that Petitioner failed to adhere to those standards of prudence. A definitive ruling in this area should await a clearer factual premise.

II. There is No Split Among the Circuits

The Petition asserts an alleged split between the Third Circuit on one hand and the Fourth, Sixth and

Seventh Circuits on the other with respect to the meaning and application of ERISA § 402(b)(3). In fact, these Circuit Courts agree that a failure to comply with ERISA § 402(b)(3) does not render an ERISA Welfare Plan unamendable for that reason alone, but does subject a particular amendment to nullification if the evidence shows that its adoption was not in compliance with a formal procedure.

In *Adams v. Avondale Industries Inc.*, 905 F.2d 943 (6th Cir.) *cert. denied*, 498 U.S. 984 (1990), the Court considered the terms of a severance plan and concluded that Congress did not intend that "any plan failing to comply with [ERISA Sec. 402(b)(3)] would for that reason alone become unamendable". 905 F.2d at 949. But the language used by the *Adams* Court suggests that it looked to ensure that the putative plan amendments had been "promulgated" by the Company and even then presumed that there were some situations in which a substantive remedy of prohibiting amendment could be imposed in response to a defendant's procedural violations. *Adams* is not in conflict with the holding below.

The Fourth Circuit holding in *Biggers v. Wittek Industries Inc.*, 4 F.3d 291 (4th Cir. 1993) focused on whether a purported amendment to a severance plan had been adopted by the appropriate formal corporate acts. Since the facts showed that the plan could be adopted "only with the approval and signature of the President" and this did not occur, the court held that the employer could not contend the new plan was in effect due to "the absence of evidence manifesting actual adoption of the new draft". Again, no conflict with the Third Circuit.

In the only other case cited by Petitioner on this point, *Murphy v. Keystone Steel and Wire Co.*, No. 93-1247, 1994 WL 172252 (D.C. Ill. 1994), the District Court acknowledged that "Defendant does not cite and the court's research has failed to discover, any Seventh Circuit case dealing specifically with the application of the procedural amendment requirements of § 402(b)(3) to a plan void of any amending procedure". There is no split among the Circuits.

III. The Decision Below Strengthens ERISA's Fundamental Policies

It is common for parties who have failed to comply with a technical requirement of ERISA to justify their statutory departure by reference to the statute's "basic purpose" as though it gave license for violation of its clear terms. In *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed. 2d 161, 173-174 (1993), this Court rejected such an approach holding that

> vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of the test regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between competing interests – not all in favor of potential plaintiffs.

The irony is that in fact the decision below strengthens the policies Petitioner now claims are undermined.

A. The requirements that the Plan set forth an amendment procedure and identify the person who has the authority to effectuate an amendment are imposed by the statute

Petitioner argues that the decision below ignores the definition of a "person" in ERISA § 3(9), 29 U.S.C. 1002(9) which can include a corporation and imposes a requirement that the plan name the particular individuals who have amendment authority. But the decision acknowledges that Petitioner could have met its statutory obligation by specifying that the Board of Directors had the authority to amend the plan as is specified in other provisions in the 1976 Constitution. (JA 549) Given the clear statutory language, it is unlikely that Congress intended the process to be circular, i.e., for the plan sponsor to merely state that it reserved the authority to amend the plan without further explication of the procedures to be utilized or the body within the sponsoring organization empowered to effectuate amendments. Petitioner's contention would be compelling if the statute read "Every employee benefit plan shall . . . state whether the plan sponsor reserves the authority to amend the plan". But the statute is more specific and the obligations of a plan sponsor are not satisfied by the general reservation used by Petitioner.

B. The procedural remedy imposed is precisely calculated to rectify Petitioner's statutory violation.

The District Court determined that Curtis-Wright had properly reserved the power to amend its health benefit

plans and refused to grant Respondent's request for an injunction barring such a plan amendment (A.40). The Court of Appeals upheld this ruling (A.14-15). Respondents' damages for the elimination of their health care coverage continued only until November 1990 when the Board of Directors of Curtiss-Wright finally acted to adopt an amendment to its retiree health plan terminating benefits in the event of plant closure. Petitioner could at any point from 1983 onward have properly restated its plan to comply with ERISA § 402(b)(3) and then effectuated a proper amendment (A.11). Petitioner could also have acted through its Board of Directors at any point to adopt or ratify such an amendment. Its willful failure to act in conformity with the statute does not render the resulting damages "draconian".

Courts construing ERISA have frequently noted that substantive remedies are not available for violations of the reporting and disclosure sections of ERISA except in extraordinary cases of active concealment.[2] *See, e.g., Lewanowski v. Occidental Chemical Corp.*, 986 F.2d 1006 (6th Cir. 1993); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3rd Cir. 1990); *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1170 (3rd Cir. 1990); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988). Those courts refused to amend the terms of a plan by granting participants substantive relief not contemplated by the terms of the plan, simply because of alleged reporting and disclosure violations. The decision below, however, does not grant

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[2] ERISA 402(b)(3) is not within ERISA's reporting and disclosure sections but within title 4, its fiduciary obligations section.

respondents additional benefits but merely enforces the plan as written without reference to improperly adopted amendments. The damages awarded below represented nothing more than the cost of continuing plan retiree benefits until such time as the Petitioner acted lawfully to adopt an amendment.

Petitioner's argument finally falls on its mistaken assertion that Respondents did not suffer any harm arising from the underlying ERISA violations. Respondents were deprived of critical retiree health care benefits as part of a casual redrafting process. At no time did appropriate corporate decision makers recognize that they were changing the terms of the plan. Respondents were deprived of their right to have significant changes in plan benefits made by persons who by designation in the plan or state corporate law were real decision makers.

C. The Decision Below Has Little Effect on the Integrity of Plan Documents

Petitioners argue at length that *certiorari* is appropriate because the decision below invalidates a plan amendment that was incorporated in an SPD that was distributed to plan participants. But any reading of ERISA § 402(b)(3) can require this result. ERISA plans that set forth amendment procedures are required to comply with such procedures before amendments are effectively adopted. *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1170 (3rd Cir. 1990). It is not possible for the readers of the terms of an SPD to determine whether any amendment procedures exist and have been satisfied in connection with any particular terms. Any term in an SPD may

in fact have been adopted improperly and may therefore be ineffective; this is true whether the decision below is reversed or not.[3]

Whatever risk of uncertainty there may be is tolerable and within the delicate balance struck by Congress between the need for due process in the amendment of plan terms and the right of participants to full disclosure. Indeed, Petitioner in effect seeks the absurd result that plan sponsors who do comply with § 402(b)(3) by establishing an amendment procedure against which the effectiveness of an amendment can be measured – the result Congress surely intended – should be worse off than plan sponsors who establish no procedures at all.

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[3] As noted *supra*, the SPD in this case provided that in the event of a conflict with plan documents, the plan documents would control.

CONCLUSION

For the foregoing reasons, the Petition for *certiorari* should be denied.

Dated: June 29, 1994

Respectfully submitted,

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